

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP113

Cir. Ct. No. 2013PR206

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE ESTATE AND TRUST OF JOHN J. HOHLER:

BARBARA A. SIMONSON, FORMERLY TRUSTEE OF THE JOHN J. AND JANE HOHLER TRUST, FORMERLY PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN J. HOHLER, TRUSTEE AND BENEFICIARY OF THE BARBARA SIMONSON SUBTRUST, AND RESIDUARY BENEFICIARY OF THE MARY VAIRA SUBTRUST,

APPELLANT,

v.

MARY M. VAIRA,

RESPONDENT,

JOSEPH G. SIMONSON,

INTERESTED PARTY.

APPEAL from orders of the circuit court for Winnebago County:
JOHN A. JORGENSEN, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Barbara A. Simonson appeals from circuit court orders which, among other things, removed her as personal representative of the Estate of John J. Hohler (the Estate) and as trustee of the John J. and Jane Hohler Trust (the Trust). Simonson, a daughter of John and Jane Hohler (both deceased), asserts that the circuit court denied her due process and did not follow statutory procedures for removal of a personal representative or trustee. We disagree and affirm.

BACKGROUND

¶2 The Estate was filed on July 16, 2013.¹ Pertinent to this appeal, the circuit court entered an order on June 5, 2015, which ordered Simonson, as trustee and personal representative, to take certain actions to close the Estate, including payments and transfers to be made to the beneficiaries. When the Estate was not closed by a court ordered deadline of August 3, 2015, the circuit court issued another order to close the Estate. On August 26, 2015, Simonson's counsel withdrew as counsel of record. Simonson subsequently petitioned pro se to extend the time to close the Estate, which the court granted and gave Simonson until October 30, 2015, to close the Estate. In September 2015, Simonson filed documents with the court attempting to close the Estate, which the circuit court

¹ Simonson was nominated as personal representative in John Hohler's will. Simonson became the successor trustee of the Trust upon the death of both John and Jane Hohler.

deemed insufficient. The court requested additional documents, including a final accounting, and set a deadline of October 5, 2015, for a status update. The court indicated that a hearing would be set if no update from Simonson was received.

¶3 Simonson did not comply with an update by October 5, 2015. A beneficiary filed a motion to compel compliance with the court’s June 5 order together with an affidavit setting forth Simonson’s alleged failures as trustee and personal representative, including her failure to make payments and disbursements to beneficiaries as ordered by the court. The notice of motion, motion to compel, and affidavit were filed on October 5, 2015, and the notice indicated that the motion would be heard “[o]n a date and time to be determined by the Court.”

¶4 The circuit court set a hearing date of November 9, 2015. An affidavit of service was filed with the court showing that the notice of hearing, notice of motion, and motion to compel were mailed to Simonson, Joseph Simonson (Simonson’s son), and Attorney Steven Krueger (Simonson’s former counsel) on October 5, 2015. A file-stamped copy of the notice of hearing, listing the November 9, 2015 hearing date, was mailed to Simonson on October 12, 2015. In a letter dated October 9, 2015, Simonson acknowledged notice of the November 9, 2015 hearing date.

¶5 Simonson failed to appear at the November 9 hearing. The circuit court made a finding that Simonson had received proper notice and proceeded with the hearing. The court found that the Estate had “dragged on much, much longer than it should have” and that Simonson had failed to follow the court’s orders. The court removed Simonson as trustee and personal representative, finding that removal would best serve the interest of the beneficiaries given

Simonson's unwillingness to comply with the court's orders and her persistent failure to administer the Trust and Estate effectively.

¶6 Simonson filed an objection to her removal as trustee and personal representative. On November 24, 2015, the court denied Simonson's objection and entered a written order removing Simonson as the trustee of the Trust, under WIS. STAT. § 701.0706(2)(c) (2013-14),² and as personal representative of the Estate, under WIS. STAT. § 857.09.

DISCUSSION

¶7 Simonson does not challenge the merits of her removal, rather she challenges only that her removal violated the "fundamental requirement[s] of due process." Simonson contends that she did not have proper notice of the hearing date nor notice that her removal was being requested. We review whether Simonson was denied due process under a de novo standard. *State v. David J.K.*, 190 Wis. 2d 726, 738, 528 N.W.2d 434 (Ct. App. 1994). The circuit court's findings of fact are reviewed under the clearly erroneous standard. *Id.*

Simonson Received Notice of the Hearing and the Matters to be Determined

¶8 "The fundamental requirements of procedural due process are notice and an opportunity to be heard." *Sweet v. Berge*, 113 Wis. 2d 61, 64, 334 N.W.2d 559 (Ct. App. 1983). Where an individual's rights or interests are impacted by a judicial decree, due process requires certain procedures tailored to protect those rights. *Guelig v. Guelig*, 2005 WI App 212, ¶32, 287 Wis. 2d 472, 704 N.W.2d

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

916. “At the very least, due process mandates that a party has notice, actual or constructive, that is reasonably calculated to inform him or her of the pending decision as well as an opportunity to appear and be heard with respect to the defense of his or her rights.” *Id.*

¶19 Simonson was provided notice of the November 9 hearing date. Under WIS. STAT. § 879.05(1), notice of a probate proceeding may be provided by mail under subsec. (2) or by personal service under subsec. (3). Section 879.05(2) provides that “[s]ervice shall be made by first class mail ... at least 20 days before the hearing or proceeding upon any person whose post-office address is known or can with reasonable diligence be ascertained.” Simonson was provided notice of the hearing as well as notice of the motion and the motion to compel by the U.S. postal service on October 5, 2015.³ Further, Simonson acknowledged receipt of the hearing notice and the motion to compel in a letter dated October 9, 2015. Simonson wrote, “I do not anticipate being available for your proposed hearing date of November 9, 2015. As a result, unless this Motion is withdrawn, the Trustee and Personal Representative [(Simonson)] will need to petition the Court to delay this hearing.” Simonson did not petition the Court to reschedule the hearing, despite recognizing that the onus was on her to address her unavailability. The circuit court properly found that notice was given to Simonson and that she had not contacted the court to request an adjournment or to appear by telephone.

³ Simonson argues that the practice for the parties was to serve each other by e-mail and that “[s]ending papers only by U.S. Mail was a departure from that prior practice.” As Simonson does not develop an argument as to how serving the notice and motion by U.S. mail negatively impacted her due process rights, we do not address it. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“We may decline to review issues inadequately briefed.”).

¶10 Simonson was also provided notice of the issues to be determined at the November 9 hearing. “Due process requires that the notice provided reasonably convey the information required for parties to prepare their defense and make their objections.” *Amy Z. v. Jon T.*, 2004 WI App 73, ¶20, 272 Wis. 2d 662, 679 N.W.2d 903. The motion to compel and the accompanying affidavit leveled serious complaints against Simonson and clearly called into question her ability to properly manage the Trust and Estate. The motion to compel also requested that the court “[appoint] an independent corporate trustee, such as a bank or trust company, to settle the trust estate and resolve disputed matters.”

¶11 The cases cited by Simonson in support of her argument that she was not provided notice of the issues to be addressed at the hearing are all distinguishable as the parties in those cases were provided no notice of the subsequent action taken by the court. *See Guelig*, 287 Wis. 2d 472, ¶39 (party had no notice that merits of the placement and custody issues would be addressed at scheduling conference); *Amy Z.*, 272 Wis. 2d 662, ¶¶21-22 (reversing child support order where neither guardianship petition nor the proceedings notified that child support would be sought); *In re Estate of White*, 69 Wis. 2d 649, 652-53, 231 N.W.2d 194 (1975) (finding removal of special administrator at pretrial conference was improper where no request or show cause order was entered).

¶12 Simonson was expressly put on notice that her continued role as personal representative and trustee would be an issue at the hearing.⁴ Simonson’s

⁴ Simonson also claimed that she was not provided sufficient notice that the circuit court would consider reopening the June 5 order. The court did not “reopen” the June 5 order, it simply allowed the successor trustee “to look [and] see if there’s a manifest injustice in the distribution of those properties And if they do find a manifest injustice, they can report that back to the Court and make a specific recommendation.”

due process rights were not violated, and the circuit court’s findings of fact are not clearly erroneous. By failing to appear at the hearing, Simonson waived any complaints as well as solidified her unsuitability to act as trustee and personal representative. *See O’Neill v. Buchanan*, 186 Wis. 2d 229, 234, 519 N.W.2d 750 (Ct. App. 1994).

*The Court Had Statutory Authority to Remove Simonson as
Personal Representative and Trustee*

¶13 Simonson argues that the circuit court failed to follow statutory procedures for the removal of a personal representative or trustee. Simonson claims lack of statutory notice and that her removal as personal representative and trustee was not based on admissible evidence or testimony under oath as “[i]t is well established that a motion to remove a personal representative or trustee is to be heard in an evidentiary hearing.” We disagree.

¶14 The circuit court may remove a trustee or personal representative for grounds as provided by statute. *See Klauser v. Schmitz*, 2003 WI App 157, ¶7, 265 Wis. 2d 860, 667 N.W.2d 862 (citing *Holzhauser v. Zartner*, 183 Wis. 506, 509, 198 N.W. 363 (1924)). WISCONSIN STAT. § 701.0706 codifies the standards for removal of a trustee.⁵ Under subsec. (1), “[t]he settlor, a cotrustee, or a qualified beneficiary may request the court to remove a trustee, or a trustee may be

⁵ Wisconsin’s new Trust Code legislation became effective on July 1, 2014. WISCONSIN STAT. § 701.0706 was formerly codified as WIS. STAT. § 701.18 (2009-10), and provided that

[a] trustee may be removed in accordance with the terms of the creating instrument or the court may, upon its own motion or upon a petition by a beneficiary or cotrustee, and upon notice and hearing, remove a trustee who fails to comply with the requirements of this chapter or a court order, or who is otherwise unsuitable to continue in office.

removed by the court on its own initiative.” Section 701.0706(2)(c) provides that a trustee may be removed if the court determines “that removal of the trustee best serves the interests of the beneficiaries because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively.”

¶15 Although the substantive arguments for Simonson’s removal are not before this court, it is important to note that whether to remove a trustee is within the sound discretion of the circuit court and will not be reversed absent an erroneous exercise of discretion. *See First Wis. Nat’l Bank of Oshkosh v. Circuit Court for Fond du Lac County*, 167 Wis. 2d 196, 201, 482 N.W.2d 118 (Ct. App. 1992). No specific method of notice is expressly codified under WIS. STAT. § 701.0706, and the court had the authority on its own initiative to remove Simonson as trustee. The court did not erroneously exercise its discretion by removing Simonson as she had refused to abide by court orders, administer the trust effectively, and failed to appear before the court to explain her actions.

¶16 The removal of a personal representative is governed by WIS. STAT. § 857.15, which provides in pertinent part:

When a personal representative is adjudicated incompetent, disqualified, unsuitable, incapable of discharging the personal representative’s duties, or is a nonresident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and caused such appointment to be filed with the court, the court shall remove the personal representative. When any personal representative has failed to perform any duty imposed by law or by any lawful order of the court or has ceased to be a resident of the state, the court may remove the personal representative. When grounds for removal appear to exist, the court on its own motion or on the petition of any person interested shall order the personal representative to appear and show cause why the personal representative should not be removed.

The decision to remove a personal representative under the statute is within the circuit court's discretion. *Bell v. Neugart*, 2002 WI App 180, ¶28, 256 Wis. 2d 969, 650 N.W.2d 52. A court has the statutory authority to remove a personal representative for failing to follow court orders:

If a personal representative fails to perform an act or file a document within the time required by statute or order of the court the court upon its own motion or upon the petition of any person interested may order the personal representative for the estate and his or her attorney to show cause why the act has not been performed or the document has not been filed.... If only the personal representative is at fault, he or she may be *summarily dismissed* and in that event the court shall then appoint another personal representative to complete the administration and close the estate.... The procedure set forth in this section is not exclusive.

WIS. STAT. § 857.09 (emphasis added).

¶17 As previously discussed, Simonson was provided proper notice of the hearing and the subject matter of the hearing. Simonson failed to appear and by doing so failed to explain why she had not complied with earlier court orders. We are satisfied that the circuit court had actual and implicit authority to remove Simonson for her failures and that the court complied with the requisite statutory procedures. The court properly exercised its discretion in removing Simonson as personal representative and trustee.

¶18 Simonson argues that a formal evidentiary hearing was required before the court could remove her as personal representative and trustee. We disagree. Neither party has presented a case or statute expressly requiring a formal evidentiary hearing. A formal evidentiary hearing was unnecessary in this case as the court relied on undisputed facts known to the court, notably Simonson's failure

to abide by previous court orders.⁶ The court detailed the history of Simonson’s action/inaction since June 2015, noting that the June 5 order “was very specific” and the court “even took ... discretion out of [Simonson’s] hands,” yet when Simonson attempted to close the Estate, the court found her attempt to be “woefully insufficient.” The court provided Simonson with a letter detailing the additional actions that she needed to take for both the Estate and the Trust and provided a deadline of October 5, 2015, which Simonson failed to abide by. *See* WIS. STAT. § 862.17 (“If after having been ordered to file the [personal representative’s] account by a day certain, the personal representative fails to comply with the order, the court shall proceed under [WIS. STAT. §] 857.09.”). Given her failure to abide by previous court orders, no formal testimony was required for the court to remove Simonson as the personal representative of the Estate and as trustee of the Trust.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁶ The record indicates that the circuit court did consider Simonson’s objections to her removal as trustee and personal representative. The circuit court, however, determined that “[e]ven considering the explanations provided by Ms. Simonson, the court finds several of them to be unacceptable and stands by its ruling of November 9, 2015.” The court’s consideration of Simonson’s arguments undercuts her assertion that she was not provided an opportunity for input.

